No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),

Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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STATEMENT OF THE CASE.

Solely because of the quantity of argumentative matter included in appellant's statement of the case, appellee finds it necessary to present the following statement of the case.

At 8:30 P. M. May 6, 1947, the SS "Frej", owned and operated by appellee, Rederiaktiebolaget Frode[1], a Swedish corporation, cast off from Pier 45-C at San Francisco en route to Havana, Cuba, having on board approximately 5060 tons of rice shipped by

[1]Appellee Rederiaktiebolaget Frode is hereinafter referred to as "Frode".

Rice Growers Association of California[2], appellant herein, to various consignees in Havana, Cuba, under eighteen separate order notify bills of lading.

At approximately 8:50 P. M. May 6, 1947, a fire broke out in the vessel's boiler room. The fire, which caused extensive damage, was combated by the crew of the SS "Frej" with assistance from various tugs and other craft, until the early forenoon of May 7, 1947, by which time the fire was extinguished.

The vessel was towed to shallow water to avoid her sinking in deep water, and at 11:30 P. M. May 6, 1947, the vessel was anchored in 23 feet of water about one-half mile southeast of Southampton Shoals to avoid loss of the vessel. After extinguishing the fire the vessel was in fact resting on the bottom and all efforts to refloat it failed until a quantity of water had been pumped out, after which the vessel was refloated at approximately 10:00 P. M. May 7, 1947, with the assistance of several tugboats.

At 1:15 A. M. May 8, 1947, the SS "Frej" returned to San Francisco and was moored at Pier 45-A. Thereafter, with the consent of all parties, the *entire cargo was unladen,* and nearly 40% of the cargo was retained and disposed of in the San Francisco Bay region, having been damaged by water, smoke and fire.

The discharge of the cargo was completed on May 14, 1947. As promptly thereafter as possible specifications for repairs were prepared and bids were taken

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[2]Rice Growers Association of California, appellant herein, is hereinafter referred to as "Rice Growers".

thereon (Apostles on Appeal pp. 46-47); the lowest bid, that of General Engineering & Dry Dock Company, was accepted by Frode, and the vessel was taken to the repair yard of General Engineering & Dry Dock Company at Alameda, California, on or about May 23, 1947.

On June 6, 1947, Rice Growers, appellant herein, filed a libel in the District Court of the United States for the Northern District of California, Southern Division, for recovery of damages in the amount of $365,990. The libel prayed that the SS "Frej" be condemned and sold to satisfy Rice Growers' claim. Pursuant to the libel, in rem process issued, and the SS "Frej" was seized and reduced to the possession of the United States Marshal.

On June 25, 1947, two crew members, Jakko Olavi Eriksson and Hamalainen, libeled the SS "Frej" for damages, wages, etc., said to have resulted during said voyage, in the amount of $8,837.14.

On June 19, 1947, Frode abandoned the voyage and so notified all receivers and shippers of the rice cargo, including Rice Growers, appellant herein (Exhibit "B", Apostles on Appeal, p. 51).

On July 17, 1947, Rice Growers, appellant herein, amended its libel to include additional claims in the amount of $100,000.

On July 25, 1947, Frode filed petition for exoneration from or limitation of liability as owners of the SS "Frej" (Apostles on Appeal p. 2).

On July 26, 1947, Frode and Rice Growers entered into an agreement (Apostles on Appeal, Exhibit "C", p. 51), which, for the mutual benefit of all parties and without prejudice, compromised certain claims in dispute. In essence, the terms of the agreement made it possible for Frode to secure the release of the vessel, in return for which Rice Growers received an undertaking to transport approximately 3200 tons of sound rice to Havana.

Frode did not by this agreement or otherwise rescind the abandonment of the voyage effected on June 19, 1947, nor did it in any way or at any time consent to transport the sound rice to Havana other than under a new and independent arrangement, as set forth in the agreement of July 26, 1947, even though for convenience said agreement of July 26, 1947, provided that the new transportation should be under the "terms" of the original bills of lading, and no inference that the abandonment of the voyage on June 19, 1947, was withdrawn or rescinded may be drawn from the fact that pursuant to said agreement, the SS "Frej" proceeded to Havana and reloaded and transported said sound rice to Havana.

Paragraph six of said agreement of July 26, 1947 (Exhibit "C", Apostles on Appeal, p. 52) provides:

> "The carrying on of the cargo and/or this agreement shall in no way prejudice any right or rights which either party now has and *shall not affect the status quo of the purported abandonment of the voyage* at San Francisco, California."[3]

[3]Emphasis supplied unless otherwise noted.

On August 1, 1947, the Shipowners & Merchants Towboat Co., Ltd. and Shipowners & Merchants Tugboat Company filed a libel in connection with the salvage services rendered to the SS "Frej" during and after the fire in the amount of $50,000.

For the purpose of fixing the amount of the limitation of liability fund the parties have stipulated to the following values:

	Vessel	Stores	Freight	
			Aggregate bill of lading charges total $101,977.03, which included the following items:	
May 6, 1947 (Prior to fire)	$255,000	$16,845	Ocean freight	$93,104.00
			Havana handling fee	5,060.03
			Manifest fee	18.00
			Handling chgs at San Francisco	2,024.01
			Wharfage at San Francisco	1,770.99
May 8, 1947	106,000	8,329	" " "	
June 19, 1947	117,000	3,000	" " "	
Aug. 4, 1947	275,000	21,825	" " "	
Sept. 18, 1947	275,000	16,005	" " "	

This appeal puts in question the amount of the limitation of liability fund. By reason of the stipulation of values entered into by the parties (Apostles on Appeal p. 45 at p. 50), the appellant's nine assignments of error raise only two questions. The first question which is presented by assignments of error 1, 2, 4, 5, 6, 7, 8 and 9 (Apostles on Appeal p. 57) is whether the District Court erred in fixing the value of the vessel and its freight as of June 19, 1947, the

date on which appellee Frode abandoned the voyage. The second question which is raised by appellant's assignment of error number 3 (and also collaterally by catch-all assignment or error number 5) is whether the District Court erred in refusing to include in the limitation fund certain accessorial or port charges in addition to the freight.

ARGUMENT.

Appellee's argument will be presented in two parts. The first part will treat the question of the time for fixing the value of the limitation fund. The second part will treat the question of items includible in "freight for the voyage."

PART I.

SUMMARY.

The value of the ship and pending freight must be fixed as of the end of the voyage. The voyage of the SS. "Frej" ended on June 19, 1947, when the voyage was abandoned by Frode, the shipowner and appellee herein.

For limitation of liability purposes the values must be taken at the end of the voyage. The "Frej's" voyage was ended by the abandonment on June 19, 1947, regardless of whether or not there was a frustration of the voyage. Even though not relevant to the issues properly presented by the appeal, the SS "Frej"

was a constructive total loss following the fire on May 6-7, 1947, and this, with other stated circumstances, properly caused the voyage to be deemed frustrated at the time of the abandonment on June 19, 1947.

(A) FOR LIMITATION OF LIABILITY PURPOSES THE VESSEL MUST BE VALUED AT THE END OF THE VOYAGE. THE VOYAGE IN QUESTION ENDED ON JUNE 19, 1947.

The value of the vessel and its pending freight for the purpose of determining the amount of the limitation of liability fund must be established as of the end of the voyage. This rule is not questioned by either appellant Rice Growers or appellee Frode and is clearly supported by the cases.

Place v. Norwich & N. Y. Transportation Co., 118 U.S. 468, 30 L. Ed. 134;

The Great Western, 118 U.S. 520, 30 L. Ed. 156 (1885);

Pacific Coast Co. v. Reynolds, 114 Fed. 877 (9 CCA 1902);

Boston Marine Insurance Co. v. The Metropolitan Redwood Lumber Co. et al., 197 Fed. 703 (9 CCA 1912).

The only question presented by appellant Rice Growers' specifications of error 1, 2, 4, 5, 6, 7, 8 and 9 is whether the District Court erred in finding that the limitation fund should be valued as of June 19, 1947, the date that the voyage was abandoned.

The cargo shipped by the appellant Rice Growers was the only cargo on board the SS "Frej" during

the voyage in question, which began at San Francisco on May 6, 1947. This voyage was unequivocally terminated and abandoned by appellee Frode on June 19, 1947, on which date notice of the termination and abandonment of the voyage was sent to all shippers and receivers of the cargo (Exhibit "B", Apostles on Appeal, p. 51).

It is Frode's position that the circumstances of the case were such as to justify Frode in abandoning the voyage under the general maritime law and the provisions of its bills of lading, but that whether or not, under the several contracts of carriage, the abandonment was or was not justified, the unequivocal abandonment of the voyage by Frode did in fact end the voyage on June 19, 1947, as of which date the vessel and its pending freight must be valued for the purpose of establishing the amount of the limitation of liability fund.

At no time did Frode rescind the abandonment of the voyage or elect to continue the voyage. The fact that the "Frej" later proceeded to Havana under an entirely separate and independent agreement dated July 26, 1947 (Exhibit "C", Apostles on Appeal, p. 51) despite the numerous references thereto in appellant's opening brief, furnishes no basis whatsoever for appellant Rice Growers' contention that the voyage of the "Frej", which began on May 6, 1947, continued until the arrival and discharge of the vessel at Havana. The arguments of Rice Growers in that respect are directly contrary to the agreed stipulation of facts. The ultimate transportation of the sound rice

cargo to Havana by the "Frej" was solely pursuant to the new agreement entered into on July 26, 1947, and did not in any way constitute a reinstatement of the original voyage which began at San Francisco May 6, 1947 and terminated at San Francisco on June 19, 1947.

Quoted below are respectively the applicable provisions of the agreement of on-carriage and of the Stipulation Re Value.

> "6. The carrying on of the cargo and/or this agreement shall in no way prejudice any right or rights which either party now has and shall not affect the present status quo of the purported abandonment of the voyage at San Francisco, California." (Exhibit "C", Apostles on Appeal, p. 52.)

> "12. *Pursuant to said agreement* (Exhibit "C") and between August 4 and August 8, 1947, the said about 3232 tons of rice formerly loaded in holds 1, 2, 4 and 5 were reloaded on the ship at San Francisco. On August 11, 1947, the ship sailed from San Francisco for Havana with only said 3232 tons of rice cargo aboard, and she arrived at Havana on August 31, 1947, and completed discharge of said 3232 tons on September 18, 1947." (Apostles on Appeal p. 49.)

(B) THE VALUE OF THE "FREJ" FOR LIMITATION OF LIABILITY PURPOSES MUST BE FIXED AS OF THE ABANDONMENT OF THE VOYAGE ON JUNE 19, 1947, WITHOUT REGARD TO POSSIBLE COLLATERAL CONTRACTUAL LIABILITIES.

The amount of the limitation of liability fund, which is the subject matter of this appeal, concerns a right of appellee Frode which is solely and exclusively statutory in nature and which is determined solely by the provisions of Title 46 USCA Section 185:

> "Section 185. *Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.*
>
> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

Although appellant Rice Growers devotes a major portion of its opening brief to the assertion of various theories and doctrines of the law of contracts, it is apparent and has long been recognized by the courts of the United States that the right to limitation of liability and the various incidents thereto are exclusively statutory in nature.

> "The right of a shipowner in the United States to limit his liability is wholly statutory, and any proceedings for limitation are governed entirely by the statutory provisions creating such a right."
> *The Maine,* 28 Fed. Supp. 578 at 582.

The rule that the "voyage" should be the unit for limitation of liability purposes was accepted by our courts as a necessary inference from the applicable statutes and is the only practicable rule affording needed certainty and consistency in such cases.

> *Place v. Norwich & N. Y. Transportation Co.,* 118 U.S. 468, 30 L. Ed. 134.

Whether the voyage is terminated rightfully or wrongfully or whether the termination of the voyage constitutes a breach of contract as to some persons are matters of no moment in so far as determining the end of the voyage for limitation of liability purposes is concerned. In applying the limitation of liability statutes the only pertinent inquiry is, "When did the voyage end?"

That the shipowner always has it in his power to terminate the voyage is recognized by the courts and is ably discussed in *The Lara,* 1947 AMC 27 (U.S. District Court, Southern District of New York), in

which the vessel, being on a voyage from New York to Barranquilla, Colombia, was involved in a collision off the coast of North Carolina on February 26, 1942. It put into Charleston for inspection, then proceeded to Tampa, where she was drydocked and repairs in the amount of $46,500 were effected. After the completion of the repairs she proceeded on her voyage, arriving at her original port of destination, Barranquilla, Colombia, on April 9, 1942. In this case the confirmed report of the commissioner of the United States District Court correctly held as follows:

> "After the collision and before the termination of the voyage, the damages caused to the *Lara* by reason of the collision with the *Cassimir* were repaired and expenses incurred in connection therewith by the owner of the *Lara* in the sum of $46,337.49 so that at the termination of the voyage, the vessel was in a fully repaired condition. Petitioners contend that this sum should be deducted from any amount found to be the value of the *Lara* at the termination of the voyage.
>
> "It is well established that the value of the ship to be surrendered by an owner in a limitation proceeding is her value at the end of the voyage on which she was engaged at the time of the happening of the casualty or casualties. *City of Norwich,* 118 U.S. 468, *The Great Western,* 118 U.S. 520. The place of termination of a voyage may vary. *In this case the owner could have terminated the voyage at Charleston, South Carolina or at Tampa, Florida, before making any repair at either place and the value of the interest of the owner of limitation of liability purposes*

would then have been the value of the vessel in her damaged condition at either place. However, the owner elected to make repairs, and continue the voyage and upon completion thereof to file its petition for limitation. It recognizes the value it is to file is the value at the end of the voyage. Its petition refers to all claims arising out of the voyage, whether out of the collision itself or prior thereto or thereafter. If an owner elects to continue the voyage at the risk of damage-claimant's security and thereafter ask for limitation of liability as to all claims occurring on the voyage whether at the time of the collision, prior to or subsequent, up to the termination of the voyage, he cannot expect the value to be fixed at a sum other than her value in the condition she is upon her arrival at the port *where the owner elects to terminate the voyage.*"

The Lara, 1947 AMC 27.

The "voyage" for limitation of liability purposes was carefully considered by the Circuit Court of Appeals for the second Circuit in *La Bourgogne,* 139 Fed. 433 at 436, in which the court said:

"In determining precisely what such adventure is under this statute, we concur with the District Judge in the conclusion that *the controlling circumstances are not to be found in the shipowner's agreements with individual shippers,* nor in the length of time for which a crew may be hired or the ship provisioned; nor is it important what nomenclature may be adopted in the shipowner's logbook or in the daily talk of its officers, nor how he keeps his accounts, nor how often the ship is inspected. The fundamental question seems to

> be this: Considering the merchandise and passengers which are shipped as a whole, when does a ship reach a port where such merchandise and passengers are no longer any part of them exposed to the risks of transport by that ship?"

The sole question before this honorable Court on this phase of the appeal is, "When did the voyage end?" Certain ludicrous and impossible results necessarily follow if Frode's unequivocal abandonment and termination of the voyage on June 19 be deemed ineffective to "end the voyage." On one hypothesis, i. e., that if the SS "Frej" after leaving San Francisco for Havana on August 11, 1947 had sunk and become a total loss, with a total loss of all cargo on board, the amount of the limitation fund for all claims arising between May 6 and the loss of the vessel would be only the amount of the freight pending at the time of the loss of the vessel, in spite of Frode's termination of the voyage on June 19, 1947 and consistent and unmodified refusal thereafter to continue the original voyage. In such a situation Rice Growers would be the first to maintain that the voyage had ended on June 19.

By reason of the stipulation contained in paragraph "6" of the agreement of July 26, 1947 (Exhibit "C", Apostles on Appeal p. 51), the fact that the SS "Frej" proceeded to Havana with rice cargo belonging to appellant Rice Growers on board may not be considered any more a reinstatement of the original voyage than if on August 11 the SS "Frej" had sailed from San Francisco to Singapore with an entirely new

cargo on board. In such a situation under appellant Rice Growers' premise that the termination of the voyage on June 19, 1947, did not "end the voyage," and that the voyage could end only with the arrival of the SS "Frej" at Havana, the "Frej" would find herself in the interesting but somewhat implausible legal situation of possibly sailing the seven years for as many years as the Flying Dutchman without ever "ending the voyage" which it began at San Francisco on May 6, 1947.

There is no act or happening that more clearly terminates a voyage than the abandonment thereof by the shipowner. After abandonment of the voyage by the shipowner, the cargo is free to obtain on-carriage by other conveyances. If the abandonment is proper, the cargo interests normally have no recourse against the shipowner; on the other hand, if the abandonment is unjustified, the shipowner must answer to the cargo interests for breach of contract. In either event, the voyage is ended by the abandonment. Appellant Rice Growers admit that the voyage was abandoned on June 19, 1947 (appellant's Opening Brief p. 22), but then assert with but scant regard for consistency that the abandonment of the voyage did not "end the voyage" because the voyage was abandoned "without justification." The "voyage" furnishes a convenient and practical unit for limitation of liability purposes, and it is respectfully submitted that a court is not required to inquire into the multitude of contracts measured by the voyage to which every vessel is party, including contracts for

insurance, crew, officers, cargo and passengers, to determine whether, under the terms of any of such contracts, possibly a somewhat different provision for the "end of the voyage" was contemplated.

La Bourgogne, 139 F. 433 at 436 (quoted supra).

The United States limitation of liability statutes were enacted "to promote the building of ships and to encourage persons engaged in the business of Navigation."

Moore v. American Transportation Co. (1860), 65 U.S. 1, 16 L. Ed. 674.

The courts of the United States, in applying and construing the limitation of liability statutes, have, in keeping with the underlying purpose of such statutes, consistently so construed and applied them as to permit the vessel to remain in the custody of the owner available for commercial maritime employment *and to provide an incentive for the owner to repair the vessel* and return the vessel to profitable and economic employment as soon as practicable. This policy is aptly demonstrated by the refusal of the courts to include the proceeds of marine hull insurance in the limitation fund.

> "The benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured or by having her appraisement made and paying the money into court or giving a stipulation in lieu of it and keeping the vessel. This double remedy given by our statutes is a great convenience to all parties. *It does not make two measures or standards of liability; for the*

measure is the same whichever course is adopted; but it enables the owner to lay out money in recovering and repairing the ship without increasing the burden to which he is subjected."

Place v. Norwich & N. Y. Transportation Co., 118 U.S. 468, 30 L. Ed. 134.

Any ruling of the sort contended for by appellant Rice Growers as to the time for fixing the amount of the limitation of liability fund would be utterly inconsistent with the rule stated above. The arguments urged by appellant Rice Growers are utterly inconsistent with the clearly enunciated policy of the courts of the United States in applying the limitation of liability statutes so as to permit the owner to repair the vessel and return it to useful employment as promptly as possible. It is respectfully submitted that under any of the arguments advanced by appellant Rice Growers, the only economic incentive operating on any shipowner would be to exercise its right to surrender the vessel as promptly as possible after the casualty to a trustee under Title 46 USCA Sec. 185. If the argument asserted by appellant were law, no shipowner would ever expend some 150% of the value of the wreck in effecting repairs, as did Frode in this case.

Under Title 46 USCA Sec. 185, the shipowner is clearly entitled to surrender the vessel to a trustee at any time within six months after receiving notice of claim, thereby terminating any voyage that the vessel may be on. The statute itself recognizes that the end of the voyage is to be determined without

regard to the multitude of contractual questions raised by appellant Rice Growers.

> "185. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner * * * or (b) *at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight* * * *."

The above quoted statutory provision clearly recognizes the right of the shipowner to terminate the voyage at any time the shipowner may elect within the six month statutory period and that for limitation of liability purposes the shipowner may end the voyage by abandonment without regard to collateral questions under the law of contracts.

The appellant Rice Growers advances the argument that under equitable principles the abandonment of the voyage by the shipowner on June 19, 1947, must be deemed to be completely ineffective and the voyage must be considered to have ended only when the vessel completed unloading at Havana on September 18, 1947. It is respectfully submitted that the "end of the voyage" is a fact certain which was definitely established by the unequivocal action of the appellee Frode on June 19, 1947. It may be noted in passing, however, that appellant Rice Growers is hardly in a position "equitably" to claim that under equitable principles the abandonment of the voyage on June

19, 1947, was ineffective since it was appellant Rice Growers' own action in libeling the ship for more than three times the value of the wreck, as much as any other single factor, that made it appear to appellee Frode on June 19, 1947, in view of exchange restrictions, that the voyage could not possibly be continued.

It is the position of appellee Frode that, for the purposes of the limitation of liability statutes, the shipowner is entitled to have the value of the vessel and its pending freight determined as of the end of the voyage and that the voyage may be ended by the voluntary act of the shipowner.

Appellee Frode's action in abandoning the voyage on June 19, 1947, was neither willful nor unreasonable, but on the contrary the circumstances of the case fully justified the abandonment of the voyage on June 19, 1947, even though it is respectfully submitted that under the applicable statutes and authorities the vessel and its pending freight must be valued as of June 19, 1947, whether the abandonment be deemed justified or unjustified.

(C) ALTHOUGH IRRELEVANT FOR LIMITATION OF LIABILITY PURPOSES, APPELLEE FRODE WAS JUSTIFIED UNDER THE LAW OF CONTRACTS IN ABANDONING THE VOYAGE ON JUNE 19, 1947.

Appellant Rice Growers contends (Appellant's Opening Brief, pp. 20 and 23) that "the voyage of a vessel may be abandoned only if:

(1) The vessel becomes a total loss, or

(2) The vessel becomes a constructive total loss, or

(3) The voyage is frustrated, as it was in the case of *The Wildwood* and *The Absaroka.*"

The position asserted by appellant Rice Growers in the above quotation is obviously mistaken; it is patent that for limitation of liability purposes the voyage of a vessel may be abandoned and ended by its owner at any time without regard to the conditions stated by appellant Rice Growers. For the purposes of discussion, however, Frode is content to assume that the above quotation from appellant Rice Growers' opening brief properly states the conditions precedent to the abandonment of a voyage in the absence of which a vessel owner will be liable to shippers as for breach of contract under most contracts of carriage. Although appellee Frode does not believe that such questions of contractual obligations are in any way pertinent to this appeal, since appellant Rice Growers has devoted such extensive discussion to such questions, appellee Frode feels constrained to discuss the questions sufficiently to demonstrate that even under the rules asserted by appellant Rice Growers the voyage of the SS "Frej" was properly abandoned on or prior to June 19, 1947, as (1) the vessel had become a constructive total loss, and (2) the voyage was frustrated as it was in the case of *The Wildwood* and *The Absaroka.*

(1) The SS "Frej" was a constructive total loss under both the American and English rules.

Under the American rule the vessel is a constructive total loss if the cost of repairing the damage suffered by the vessel exceeds fifty per cent of the sound value of the vessel.

Jeffcott v. Aetna Insurance Co. (1942), 129 F. 2d 582 at 586.

In the instant case the SS "Frej" was clearly a constructive total loss on May 8, 1947, following the fire, as the cost of repairing the damage caused by the fire, $167,498.99 (Stipulation Re Value, paragraph 4, Apostles on Appeal p. 47), was in excess of 65% of the sound value of the vessel, $255,000 (Stipulation Re Value, paragraph 13, Apostles on Appeal p. 50).

Appellee Frode does not believe or contend that whether the SS "Frej" was or was not a constructive total loss following the fire is a proper consideration or relevant to the questions involved in this appeal. Appellee Frode points out that the SS "Frej" was a constructive total loss following the fire only to demonstrate that the opinion of the United States Supreme Court in the case of *The Maggie Hammond v. Morland,* 9 Wall. 435, 19 L. Ed. 722, relied upon by appellant, is completely inapplicable. Although the opinion does not reveal the value of *The Maggie Hammond,* it does appear that the repairs cost £185, 17 shillings, against which was credited £130 for yellow metal removed from the vessel in effecting the repairs. Thus it appears that the total net out of pocket cost of the repairs to *The Maggie Hammond* was £55,

17 shillings, which we must assume was only a small percentage of the total value of the vessel.

The Maggie Hammond v. Morland, 9 Wall. 435, 19 L. Ed. 772 at 777.

Appellant Rice Growers quoted at length from the opinion of Judge Collins in *Assicurazioni Generali v. SS. Bessie Morris Co.* (1892), 1 Q.B. 571. On appeal before the Court of Appeals the case was decided by Judges Esher, Bowen and Kay reported in Volume VII (N.S.), Aspinall's Reports of Maritime Cases, p. 217. Although the Court of Appeals affirmed the decision of the Queen's Bench division cited by appellant, it should be noted that Lords Kay and Bowen appear to base their opinion on the failure of the circumstances to meet the English rule for constructive total loss, and that only Lord Esher, even though expressly rejecting the applicability of the doctrine of constructive total loss to the circumstances of the case, applied in principle the English rule of constructive total loss.

In any event the portion of the opinion of Judge Collins quoted at length by appellant (Appellant's Opening Brief, pp. 14-15) would appear to be overruled by the opinion of the House of Lords in

Macbeth & Co. v. Maritime Insurance Co. (1908), AC 144, XI Aspinall's Maritime Cases (N.S.) 52.

The general doctrine applied in both the English and American cases is the same, i. e., that the owner is justified in treating the damage as a constructive total loss if the owners with reasonable prudence and

discretion are convinced that the vessel cannot be recovered without hazard of expense utterly disproportionate to the real value.

Arnould on Marine Insurance, 6th Ed., Sec. 1117, p. 1432.

The difference between the English and American rules is found in the fact that under the American authorities the expense has consistently been deemed disproportionate to the benefit if it appears that the expense of repairs would exceed 50% of the repaired or sound value of the vessel.

Fuller v. McCall (1794), 1 L. Ed 356;

Marcardier v. Chesapeake Insurance Co. (1814), 8 Cranch 39, 12 U.S. 39, 3 L. Ed. 481;

Jeffcott v. Aetna Insurance Co. (1942), 129 F. 2d 582.

It should also be pointed out that *even under the English common law rule, the "Frej" would be deemed a constructive total loss,* as under the English rule the shipowner is entitled to add the value of the wreck to the cost of the repairs to determine whether the cost of repairs would exceed the value of the ship when repaired, i.e., restored to its original condition.

Macbeth & Co. v. Maritime Insurance Co. (1908), AC 144, XI Aspinall's Maritime Cases (N.S.) p. 52.

If from the repaired value of the vessel, $275,000, we deduct the cost of certain betterments which the owner effected ($17,349.40), we have the value of the vessel in its restored condition of $257,650.60, which amount is substantially exceeded by the cost of the

repairs, $273,498.99 ($167,498.99 paid under contract to the repair yard plus $106,000, the value of the wreck). It is worthy of note that the *Macbeth* case was decided by the House of Lords, the highest tribunal of England, and that the court had before it the case upon which appellant Rice Growers relies so strongly, *Assicurazioni Generali v. SS Bessie Morris Co.,* VII Asp. Maritime Law Cases 217 (1892).

Macbeth & Co. v. Maritime Insurance Co., XI Asp. M. L. Cas., 52 at 54.

Appellant Rice Growers cites *Ellis v. Atlantic Mutual Insurance Co.,* 108 U.S. 342, 2 Sup. Court 746, 27 L. Ed. 747, as authority for "the rule that a contract for carriage of goods by sea *is not dissolved unless* the ship is so injured that the cost of her repairs would exceed her value when repaired, also prevails in the United States." (Appellant's Opening Brief p. 15.) Upon a close review of this opinion, appellee Frode is unable to find that the case supports the proposition stated by appellant. The case is authority for the proposition that a contract for carriage of goods by sea *is dissolved when* a ship is so injured that the cost of repairs would exceed her value when repaired, but this proposition is nowhere contested by appellee.

(2) The voyage of the Frej was frustrated.

Again, appellee Frode does not believe or contend that the question of whether or not the voyage of the SS "Frej" was frustrated at the time of the abandonment of the voyage on June 19, 1947, is either proper or relevant to the determination of this cause.

Solely because of the extensive arguments stated by appellant on this question, appellee Frod is constrained to show that, even though irrelevant, the voyage of the "Frej" was frustrated at the time the voyage was abandoned.

Appellee Frode believes, and asserted in the District Court, that the voyage of the "Frej" was automatically terminated by reason of the damages and stranding resulting from the fire within the rule recognized by this Honorable Court in *Boston Marine Insurance Co. v. Metropolitan Redwood Lumber Co.,* 197 F. 703 at 712, in which the voyage was deemed terminated at sea by the collision, even though the vessel remained afloat and was towed into port.

Since the voyage was automatically terminated on May 8, 1947 by the disaster, *a fortiori* the voyage was ended when formally abandoned by Frode on June 19, 1947.

The doctrine of commercial frustration is, of course, solely a doctrine of the law of contracts. All of the cases which consider commercial frustration and the right of a contracting party to abandon a venture by reason thereof are in agreement that circumstances constituting frustration are to be considered as of the time that the party claiming frustration elects to abandon the venture.

Kronprinzessin Cecelie, 244 U.S. 12, 37 S.C. 490, 61 L. Ed. 960;

The Absaroka, 1947 AMC 325, 159 F. (2d) 134;

The Wildwood, 1943 AMC 320, 133 F. (2d) 765.

On June 19, 1947, when appellee Frode abandoned the voyage of the SS "Frej", the circumstances confronting appellee convinced appellee, as they would any reasonable shipowner, that the purposes of the voyage of the "Frej" had been effectively frustrated. The "Frej" had been rendered unnavigable and completely unseaworthy by fire and stranding, so that she required repairs exceeding her value to fit her for sea. Approximately two-fifths of the cargo had been so damaged as to be unfit for on-carriage; as to this damaged rice, *which is the only cargo as to which Rice Growers is asserting claim,* the voyage was completely frustrated and admittedly ended at San Francisco prior to June 19, 1947. In addition, Rice Growers, present appellant, had arrested the vessel for some $365,000, in the face of which appellee was unable to free the vessel and continue the voyage in view of exchange restrictions.

Rice Growers' claims as to the effect of the alleged breach of contract on the "end of the voyage" are completely irrelevant. A voyage may be frustrated and deemed abandoned even though the causes underlying the frustration constitute a breach of contract.

The Louise, 1945 AMC 363, 58 F. Sup. 445.

PART II.

SUMMARY.

The bills of lading (see Exhibit "A" attached to original Stipulation Re Value, cf. Apostles on Appeal p. 62) stated the charge for ocean freight and separately stated the charges for various accessorial services and facilities to be furnished to the cargo before the beginning of the voyage or after the end of the voyage. Where, as in this case, the several charges are separately stated and divisible, only the charge for transportation during the voyage is includable in "freight for the voyage."

(A) ONLY EARNINGS FOR THE VOYAGE ARE INCLUDED IN "FREIGHT FOR THE VOYAGE."

For limitation of liability the shipowner is required to surrender only his *interest* in the vessel and its freight then pending. (46 USCA 185.)

It has long been settled that only that freight which the shipowner has earned for the voyage and is entitled to retain need be surrendered.

Pacific Coast Co. v. Reynolds, 9 CCA (1902), 114 F. 877.

Appellee Frode vehemently denies that its abandonment of the voyage was improper or in any wise constituted a breach of contract. Frode alleges that the abandonment of the voyage was in all ways proper and that hence it was entitled to retain the prepaid freight.

The inconsistency of the position of appellant Rice Growers is apparent. Appellant on the one hand argues that the abandonment was not justified under the principles considered by this honorable Court in the *Absaroka* and presumably asserts as a corollary that by abandoning the voyage on June 19, 1947, appellee Frode lost its right to retain the freight paid on the sound portion of the cargo, there being no question that the voyage was frustrated as to nearly 40% of the cargo, which was damaged and disposed of at San Francisco. Yet appellant argues that the full charges received by Frode from Rice Growers should be deemed "earned freight" for fixing the amount of the limitation of liability fund.

Ignoring the inconsistencies in appellant's position, the question in the form presented by appellant under assignment of error number 3 is whether the District Court erred in excluding charges other than freight from the computation of the limitation fund.

It is clear under the applicable statutes and authorities that "freight" for the purpose of the limitation of liability statutes includes all earnings of the *voyage* or, as stated in some cases, it is the intent of the statutes that the shipowner surrender his entire investment in the voyage, including any interest that the owner may have in the earnings of the voyage.

The Jane Grey, 99 F. 582.

It is readily admitted that, depending upon the terms of the individual contracts of carriage, some items may or may not be included in the "pending

freight'' for limitation of liability purposes. For example, where the contract is for an indivisible lump sum, the entire amount will be deemed freight, even though it includes compressing and baling the cargo.

Ellis v. Atlantic Mutual Insurance Co., 108 U.S. 342, 2 S.C. 746, 27 L. Ed. 747.

(B) THE NATURE OF THE CHARGES IN QUESTION.

It is necessary to review the nature of the separately stated items that appellant claims the District Court erred in excluding from the ''pending freight''.

Havana handling fee: This item represents the charges assessed against the cargo for the use of the terminal at Havana by the cargo; it does not include any costs of stevedoring in unloading or other expenses attributable to the operation of the vessel in transporting, loading or unloading the goods. It represents solely the charge assessed by the Havana terminal authorities, payable by the cargo, for receiving and delivering the cargo after the cargo has left the custody of the vessel.

Manifest fee: It is necessary that the bills of lading for all cargo entering Havana be translated into Spanish and visaed by the Cuban Consulate at San Francisco. Under Article 14 of the bills of lading, such documentation charges are for the account of the cargo, and the manifest fee of $1.00 per bill of lading covers the cost of the necessary Cuban documentation for the cargo, which appellee performed for appellant

Rice Growers in addition to transportation of the goods. The services covered by the manifest fee were completed before the SS "Frej" began its voyage on May 6, 1947.

Handling charges at San Francisco cover the stevedoring costs from place of rest on the dock to ship's tackle. There is no element of compensation in such handling charges for the use or operation of the vessel. The amount of such handling charges covers solely an operation which was completely terminated before the cargo entered the custody of the vessel. Appellee, as exclusively the owner and operator of a vessel, was unable itself to furnish the services covered by the handling charges and therefore stated such charges separately from the freight which it was charging for carriage of the goods on the contemplated voyage.

Wharfage at San Francisco is the charge assessed by the State Board of Harbor Commissioners at San Francisco for the use which the cargo makes of the piers. This charge has no relation to the operation of the vessel and is transmitted in toto by the carrier to the port authorities. The use of facilities for which the toll is exacted is concluded at the time the goods enter the custody of the vessel and before the vessel begins its voyage.

It is apparent that none of the bill of lading charges, with the exception of "ocean freight", is includable in the *earnings* of the shipowner for the *voyage* or in freight for the use of the ship.

(1) None of the charges in question was for services to be performed during the voyage.

All of the charges which appellant asserts should be included in pending freight are in the nature of "port charges," which were specifically considered by the District Court for the Southern District of New York and excluded from the amount of pending freight.

> "The vessel was sailed by the master, who was not one of the owners, on half shares. The interest of the owners in the freight was one-half of the freight *after deducting port charges,* and so the Commissioner has found. Report confirmed."
>
> *In re Wright, et al.,* Fed. Cas. 18,066 (1878).

The several contracts of carriage involved in this appeal each clearly contemplated that the actual transportation services performed by the vessel, i.e., so-called tackle to tackle transportation, should be fully compensated for by the "ocean freight." The arrangements between the parties likewise clearly contemplated that all charges other than "ocean freight", all of which are related to services or facilities furnished to the cargo before loading and after discharge from the vessel, should be separately stated and separately charged. The only question is whether, in a situation such as the present one, where the carrier and the shipper have agreed that certain charges relating to services before the commencement of the voyage and after the termination of the voyage, shall be separately stated, such charges must, in spite of that agreement, be deemed included in the *earnings* of the *voyage.* It is respectfully submitted that such is not the case.

It is clear under 46 USCA 184, as indicative of the intent of 46 USCA 185, as well as the authorities, that the freight or earnings to be surrendered is the "freight for the *voyage.*"

La Bourgogne, 139 F. 433 at 436.

> "Whenever any such embezzlement, loss, or destruction is suffered * * *, and the whole value of the vessel, *and her freight for the voyage,* is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freights and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." 46 USCA 184.

(C) WHERE, AS HERE, CHARGES OTHER THAN THOSE FOR TRANSPORTATION DURING THE VOYAGE ARE SEPARATELY STATED AND DIVISIBLE, SUCH CHARGES ARE NOT INCLUDED IN THE FRIEGHT FOR THE VOYAGE.

Although in some cases where the carriage is for an agreed lump sum indivisible freight payment, it would be proper to include the entire payment as pending freight because of the indivisible nature of the payment, in a case such as the present one, where certain services before loading and after discharge are separately stated, it is clear that such charges are not includable in "freight for the *voyage.*"

It is clear from all cases which have considered the question and where the sum paid by the shipper is apportionable or divisible, that only that portion of the payment which is attributable to the ocean transportation is includable in "pending freight" for limitation of liability purposes.

In re Wright, Fed. Cas. 18,066;
Ralli v. N. Y. & T. S.S. Co., 154 F. 286.

In its opinion in *Pacific Coast Co. v. Reynolds,* this Honorable Court raised the question whether wharfage and advance charges should be deemed includable in "freight."

> "It results that the item of $3,867.47 for prepaid freight, wharfage, and advance charges must be deducted from the amount the petitioner should be required to pay in order to secure the benefit of the statute limiting its liability, even if all of the items entering into that charge can be properly regarded as freight."
>
> *Pacific Coast Co. v. Reynolds,* 114 Fed. 877 at 882.

In *Ralli v. N. Y. & T. S.S. Co.,* 154 Fed. 286 at 288, the Court of Appeals for the Second Circuit considered a situation in which a respondent had asserted the limitation of liability statutes as a defense. Respondent carrier had issued through bills of lading at Galveston for transportation of certain cargo to Ghent, Belgium, with transshipment at New York. Both the initial carrying vessel and the lighter in the New York harbor on which the damage occurred were owned by the respondent. The through freight rate from Galveston to Ghent was 37¢, of which 18¢ was

shown to be applicable to the carriage from New York to Ghent and 3¢ was shown to be the price of lightering in New York harbor. The District Court had held that the pending freight of the lighter, on which the damage occurred, was 19¢ per 100 pounds (the price of lighterage plus the cost of transportation from Galveston to New York). The Circuit Court reversed the District Court on this point and held that the "pending freight" was only the 3¢ per 100 pounds representing the cost of lightering in New York harbor, even though the lighter and the vessel which had carried the goods from Galveston to New York both belonged to the same owner.

The same case supports the rule that only freight for the *voyage* need be surrendered, and where the charges received by the carrier are divisible, only those charges attributable to the *"voyage"* need be surrendered.

Although in certain situations there may be a question as to when a voyage commences, it is clear that as to goods and cargo, the voyage does not commence until the goods are laden on board.

> "We are of the opinion that respondent cannot claim the benefit of the section above quoted for the reason that the voyage had not commenced. The cargo was not yet all on board, nor the vessel ready to sail."
>
> *Ralli v. N. Y. & T. S.S. Co.,* 154 Fed. 286 at 287.

Similarly, the limitation of liability statute itself, 46 USCA 183, treats the lading on board of cargo as the critical act and moment for the purposes of the

statute. No limitation of liability may be had as to goods prior to their being laden on board.

> "46 USCA 183. (a) The liability of the owner of any vessel whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods or merchandise, *shipped or put on board of such vessel* * * *"

Likewise it is clear that the Havana handling fee, which was for services after the end of the contemplated voyage, should not be included.

It is clear that the Havana handling fee was for services contemplated to be performed after the end of the voyage. The question of the "end of the voyage" was carefully considered in *The Pelotas,* 21 F. (2d) 236, in which limitation of liability was denied for damages sustained following the end of the voyage.

> "Moreover, in contemplation of law a voyage of a vessel has been consistently recognized and defined as the sailing or passage or transit of a ship from a port of origin to a port of destination. *The voyage ends when the vessel is safely moored at a port of destination and is ready for unloading.*"
>
> *The Pelotas,* 21 F. (2d) 236.

It is respectfully submitted that where, as in this situation, charges for certain services to be rendered prior to lading on board of the cargo and after unlading are separately assessed, such charges need not be surrendered under the limitation of liability statutes, particularly as the services in connection with which such charges are assessed are all completely per-

formed either prior to or subsequent to the period during which the limitation of liability statutes apply.

It is clear under the several contracts of carriage concerned in this litigation that the sums designated as "ocean freight" were intended by the parties to constitute the full payment for the contemplated "tackle to tackle" transportation of the goods by appellee. It is likewise clear under the foregoing authorities that for limitation of liability purposes in a situation of this type, the contemplated voyage is bounded and defined by the ship's tackle. This view is supported by the language of the limitation statutes themselves, the definition of "carriage of goods" contained in the United States Carriage of Goods by Sea Act, 46 USCA, Sec. 1301(e), and the foregoing authorities.

> "46 USCA 1301(e). The term 'carriage of goods' covers the period from the time the goods are loaded on to the time when they are discharged from the ship."

The charges in question are not attributable to services comprised in the "voyage" but are separately stated and clearly divisible from the freight, and it is respectfully submitted that moneys received to cover disbursements for charges before the beginning and after the end of the contemplated *voyage* are not includable in "freight for the voyage." The period covered by the contracts of carriage may be greater than the period of the voyage, but it is only the *earnings* of the *voyage* that are included in the limitation fund.

La Bourgogne, 139 F. 433;

Ralli v. N. Y. & T. S.S. Co., 154 F. 286.

CONCLUSION.

It is respectfully submitted that the owner's interest in the SS "Frej" and its pending freight must be valued as of June 19, 1947, on which date the voyage was ended by abandonment even if not earlier ended by the catastrophe, and further, that only the ocean freight charge, the only charge applicable to the "voyage", is includable in freight for the voyage. Accordingly, the order of the District Court fixing the limitation of liability fund at $213,104 should be affirmed with costs to appellee.

Dated, San Francisco, California,
April 1, 1949.

Respectfully submitted,
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Proctors for Appellee.